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VIA HAND DELIVERY

May 13, 2003

EX PARTE

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

RECEIVED

MAY 13 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Oral *Ex Parte* Presentation
CC Docket No. 02-33

Dear Ms. Dortch:

On May 12, 2003, Linda Kent and the undersigned, both of Lampert & O'Connor, P.C., and Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("AOL") on behalf of AOL, met with Commissioner Kathleen Abernathy and Matthew Brill, Senior Legal Advisor, and Anna Mackowiak, Legal Intern, both of the Office of Commissioner Abernathy, regarding the above-referenced proceeding.

In the meeting, we discussed the fact that the proposed Title I reclassification of wireline broadband telecommunications services would be subject to significant legal challenge and uncertainty. We noted that longstanding FCC precedent makes clear that wireline broadband telecommunications services are subject to Title II and that the *Computer Inquiry* requirements are based in Title II as well. We explained that judicial precedent demonstrates that courts have consistently held that the regulatory classification of common carrier services is not a matter of FCC discretion, but rather must satisfy the legal tests set forth in *NARUC I*. We noted that Title I is not a stand-alone basis for authority but must be consistent with other provisions of the Act and that there is insufficient statutory nexus to sustain Title I authority in this case. Based on the case precedent, we observed that judicial deference is unlikely.

We further stated that a shift to Title I would undermine the FCC's enforcement process and noted that the lack of precedent will effectively eliminate enforcement, even

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assuming that Title I enforcement is upheld in the face of almost certain legal challenge. The resulting uncertainty will further chill information service deployment, innovation and investment.

Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this letter are being provided to you for inclusion in the public record of the above-captioned proceeding. Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "Donna N. Lampert", written over the word "Sincerely,".

Donna N. Lampert
Counsel for AOL Time Warner Inc.

cc: Commissioner Kathleen Abernathy
Matthew Brill